

[Lawsuit - Originally filed 4-18-07, naming
"Bridges Bay Resort, LLC" as defendant.
This amended petition, filed 6-12-07, named
"BBR, LLC" as defendant.]

IN THE IOWA DISTRICT COURT FOR DICKINSON COUNTY

STATE OF IOWA, ex rel., THOMAS J.
MILLER, ATTORNEY GENERAL OF
IOWA (99AG23112),

Plaintiff,

vs.

BBR, L.L.C., d/b/a BBR of SOUTH
DAKOTA, L.L.C.,

Defendant.

LAW NO. CVCV022938

**AMENDED AND SUBSTITUTED
PETITION AT LAW**

COME NOW Plaintiff State of Iowa, ex rel., Thomas J. Miller, Attorney General of Iowa, pursuant to Iowa Code section 455B.112, and for its Amended and Substituted Petition at Law against Defendant BBR, L.L.C., d/b/a BBR of South Dakota, L.L.C. (BBR), states as follows:

Introduction

1. The State of Iowa seeks the assessment of civil penalties and injunctive relief against Defendant BBR for repeated illegal discharges of sediment to East Okoboji Lake with resulting water quality violations. In addition, BBR failed to comply with National Pollutant Discharge Elimination System (NPDES) Storm Water General Permit No. 2, failed to implement a pollution prevention plan, and illegally burned solid waste at its construction site.

Parties

2. The State of Iowa is a sovereign state of the United States of America.
3. Thomas J. Miller is the duly elected Attorney General for the State of Iowa.

4. Defendant BBR, L.L.C. is a limited liability company organized in the State of South Dakota and authorized to do business in this state. Its principal place of business is 4208 West 38th Street, Sioux Falls, South Dakota 57106. BBR, L.L.C. has adopted the name BBR of South Dakota, L.L.C. under which it may operate in Iowa. BBR of South Dakota, L.L.C. is also authorized to do business in this state.

Jurisdiction

Attorney General Independent Enforcement Authority

5. The Attorney General is authorized to institute civil or criminal proceedings, including an action for injunction, to enforce the provisions of Iowa Code chapter 455B, including orders or permits issued or rules adopted thereunder. Iowa Code § 455B.112.

Water Pollution Control Regulations

6. The DNR is the agency of the state responsible for the prevention, abatement, or control of water pollution. Iowa Code § 455B.172(1). Rulemaking authority for establishing water quality and effluent standards is contained in Iowa Code section 455B.173(2). Rulemaking authority relating to disposal systems is contained in Iowa Code section 455B.173(3).

7. The dumping, depositing, or discharging of pollutants into any water of the state except adequately treated sewage, industrial waste, or other waste pursuant to a permit issued by the DNR is prohibited by Iowa Code section 455B.186(1).

8. A pollutant whether treated or untreated shall not be discharged into any state-owned natural or artificial lake. Iowa Code § 455B.186(1). Sediment is a "pollutant" as defined in Iowa Code section 455B.171(18).

9. A “water of the state” means “any stream, lake, pond, marsh, watercourse, waterway, well, spring, reservoir, aquifer, irrigation system, drainage system, and any other body or accumulation of water, surface or underground, natural or artificial, public or private, which are contained within, flow through or border upon the state or any portion thereof.” Iowa Code § 455B.171(37). East Okoboji Lake is a “water of the state” as defined in Iowa Code section 455B.171(37).

10. “High quality waters” means those waters designated as such in 567 Iowa Admin. Code chapter 61, which exceed the levels described in chapter 61 as necessary to protect existing water uses. The chemical integrity of these waters is enhanced and distinguished as high quality by the exceptional water clarity necessary to protect and maintain the existing designated uses of these waters. Examples include the cold water streams designated by the Iowa Conservation Commission (now the DNR) as Iowa’s catchable and special trout streams, and the Iowa Great Lakes Chain. 567 Iowa Admin. Code 60.2. East Okoboji Lake is designated as a high quality water resource under 567 Iowa Admin. Code chapter 61.

11. Surface waters shall be free from materials attributable to wastewater discharge or agricultural practices producing objectionable color, odor or other aesthetically objectionable conditions. 567 Iowa Admin. Code 61.3(2)“c.”

12. Surface waters shall be free from substances attributable to wastewater discharges or agricultural practices in concentrations or combinations which are acutely toxic to animal life. 567 Iowa Admin. Code 61.3(2)“d.”

13. A person who violates any provision of part 1 of division III of Iowa Code chapter 455B or any permit, rule, standard, or order issued under part 1 of division III of chapter 455B

shall be subject to a civil penalty not to exceed Five Thousand Dollars (\$5,000.00) for each day of such violation. Iowa Code § 455B.191(1).

Storm Water Discharge Regulations

14. The director of the DNR is authorized to issue storm water discharge general permits for a class of facilities which could be described as conditioned by a single permit. Iowa Code § 455B.103A(1); 567 Iowa Admin. Code 64.4(2)(a)(1).

15. “[S]torm water” is defined as storm water runoff, snow melt runoff, and surface runoff and drainage. 567 Iowa Admin. Code 60.2.

16. No person shall operate any wastewater disposal system or part thereof without or contrary to any condition of an operation permit issued by the director. 567 Iowa Admin. Code 64.3(1).

17. The DNR has adopted a general permit for Storm Water Discharge Associated with Industrial Activity for Construction Activities, NPDES General Permit No. 2. 567 Iowa Admin. Code 64.15(2).

18. An applicant proposing to conduct activities covered by NPDES General Permit No. 2, Storm Water Discharge Associated with Industrial Activity for Construction Activities, is required to file a complete Notice of Intent by submitting to the DNR the following: 1) a fully completed Notice of Intent application form (Form 542-1415); 2) a general permit fee according to the schedule in 567 Iowa Admin. Code 64.16 payable to the DNR; and 3) a demonstration that a public notice was published in at least two newspapers with the largest circulation in the area in which the facility is located or the activity will occur. 567 Iowa Admin. Code 64.6(1)(a)-(c).

19. NPDES General Permit No. 2, Storm Water Discharge Associated with Industrial Activity for Construction Activities, provides that certain storm water discharges associated with industrial activity for construction activities are not authorized by the permit, including storm water discharges associated with industrial activity for construction activities that the Iowa Department of Natural Resources has determined to be or may reasonably be expected to be contributing to a violation of a water quality standard. NPDES General Permit No. 2, Part I.B.2.c.

20. A storm water pollution prevention plan shall be developed for each construction site covered by the permit. Facilities must implement the provisions of the storm water pollution prevention plan. NPDES General Permit No. 2, Part IV.

21. The pollution prevention plan shall be signed in accordance with Part VI.G., and be retained at the construction site from the date construction activities begin to the date of final stabilization. NPDES General Permit No. 2, Part IV.B.1.

22. The permittee shall amend the plan whenever there is a change in design, construction, operation, or maintenance, which has a significant effect on the potential for the discharge of pollutants to the waters of the United States and which has not been addressed in the plan or if the storm water pollution prevention plan proves to be ineffective in eliminating or significantly minimizing pollutants from sources identified in Part IV.D.2. of the permit, or in otherwise achieving the general objectives of controlling pollutants in storm water discharge associated with industrial activity for construction activities. NPDES General Permit No. 2, Part IV.C.

23. For common drainage locations that serve an area with more than 10 disturbed acres at one time, a temporary (or permanent) sediment basin providing 3,600 cubic feet of storage per acre drained, or equivalent control measures, shall be provided where attainable until final stabilization of the site. NPDES General Permit No. 2, Part IV.D.2.A.(2)(a).

24. Qualified personnel (provided by the discharger) shall inspect disturbed areas of the construction site that have not been finally stabilized at least once every seven calendar days and within 24 hours of the end of a storm that is 0.5 inches or greater. NPDES General Permit No. 2, Part IV.D.4.

25. Based on the results of the inspection, the description of potential pollutant sources identified in the plan in accordance with paragraph IV.D.1. of the permit and pollution prevention measures identified in the plan in accordance with paragraph IV.D.2. of the permit shall be revised as appropriate as soon as practicable after such inspection. NPDES General Permit No. 2, Part IV.D.4.B.

26. All contractors and subcontractors identified in a storm water pollution prevention plan in accordance with Part IV.D.7.A. of the permit shall sign a copy of a certification statement before conducting any professional service at the site identified in the storm water pollution prevention plan. NPDES General Permit No. 2, Part IV.D.7.B.

27. If there is a construction trailer, shed or other covered structure located on the property, the permittee shall retain a copy of the storm water pollution prevention plan required by the permit at the construction site from the date of project initiation to the date of final stabilization. NPDES General Permit No. 2, Part V.B.

28. The permittee must comply with all conditions of the permit. Any permit non-compliance constitutes a violation of the Code of Iowa and the Clean Water Act and is grounds for enforcement action. NPDES General Permit No. 2, Part VI.A.1.

29. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of the permit which has a reasonable likelihood of adversely affecting human health or the environment. NPDES General Permit No. 2, Part VI.D.

30. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances), which are installed or used by the permittee to achieve compliance with the conditions of the permit and with the requirements of storm water pollution prevention plans. NPDES General Permit No. 2, Part VI.M.

31. The enforcement provisions of Iowa Code chapter 455B, division III, part 1 of Iowa Code chapter 455B apply to general permits for storm water discharge. Iowa Code § 455B.103A(5).

Air Quality

32. Rulemaking authority relating to evaluation, abatement, control, and prevention of air pollution is contained in Iowa Code section 455B.133(2). 567 Iowa Admin. Code 20-29 contains rules relating to air quality.

33. Any person is prohibited from allowing, causing, or permitting open burning of combustible materials, unless a variance has been granted under 567 Iowa Admin. Code 23.2(2), or one of the exemptions listed in 567 Iowa Admin. Code 23.2(3) applies. 567 Iowa Admin. Code 23.2(1).

34. The Attorney General, at the request of the DNR, may institute a civil action for injunctive relief to prevent any further violations of an order, permit, or rule, or for the assessment of a civil penalty, not to exceed Ten Thousand Dollars (\$10,000.00) per day for each day such violation continues, or both such injunctive relief and civil penalty. Iowa Code § 455B.146.

FACTS

35. Effective October 1, 2002 through October 1, 2007, the DNR issued National Pollutant Discharge Elimination System (NPDES) General Permit No. 2 for Storm Water Discharges Associated with Industrial Activity for Construction Activities. A copy of NPDES General Permit No. 2 is attached hereto as Exhibit A, and by this reference is incorporated herein. The permit applies to all areas of the State of Iowa, and includes storm water discharges associated with construction at BBR's site.

36. At all times material hereto, BBR engaged in developing a site located in the SE 1/4 of Section 20, T99N, R36W along the south shoreline of East Okoboji Lake in Dickinson County, Iowa. The property is being developed into a vacation resort with hotel, water park, and condominium housing. Approximately twenty (20) acres have been disturbed.

37. East Okoboji Lake is a state-owned natural lake, designated as a high quality water resource. The chemical integrity of the lake is enhanced and distinguished as high quality.

38. On June 7, 2005, the DNR received a completed Notice of intent to be covered under NPDES Storm Water General Permit No.2 from BBR for the site referenced above. The application stated that a Pollution Prevention Plan had been developed. On June 14, 2005, the

DNR issued authorization to BBR to begin construction pursuant to NPDES Storm Water General Permit No. 2. Construction at the site commenced on July 14, 2005.

39. On October 4, 2005, DNR officials conducted a storm water compliance inspection at BBR's site. BBR's pollution prevention plan was not at the site. The contractor certification statement had not been signed by BBR's contractors and subcontractors. When BBR's representatives furnished a copy of the plan, DNR officials noted that it required that Geomattng be installed along the steep lakeshore bank and that perimeter silt fencing be installed along the lake side of the development. The Geomattng had not been installed. DNR officials advised BBR that the pollution prevention plan must be on site, that the contractor's certification must be signed, and that site dewatering must not be directly discharged into East Okoboji Lake without passing through a control measure.

40. In response to a complaint on October 12, 2005, that BBR was pumping dirty water into East Okoboji Lake, DNR officials investigated the site that day and observed water being pumped out of a pit. Piping from the pit ran across a temporary road and then into a ravine that emptied into the lake. DNR officials found sediment from the ravine discharging into the lake, and a large brown plume in the lake in the vicinity of the discharge. BBR was directed to immediately stop the discharge.

41. On April 14, 2006, DNR officials conducted a storm water compliance inspection at BBR's site. The pollution prevention plan was not on site. The contractor's certification had not been signed. DNR officials observed that a channel had been dug in the center of the site leading directly to East Okoboji Lake. There were no control measures installed to protect the channel. Geomattng had not been installed along the lakeshore bank as required by the

pollution prevention plan. In addition, perimeter silt fencing along the lake side of the development had been knocked down or filled with sediment and was no longer effective. Other perimeter silt fencing was not properly installed because posts had not been set deep enough and backfilled.

42. On May 5, 2006, DNR officials returned to the site to determine whether deficiencies which they had observed had been corrected by BBR. The contractor certification statement had not been signed. No protective measures had been installed along the open channel in the center of the project. Several silt fences were still not properly installed.

43. On June 13, 2006, DNR officials visited the project. The contractor certification was not signed. The open channel in the center of the site was not protected by any control measures. Nearly all of the lakeside silt fencing had been knocked down. DNR officials also observed on site a large pile of construction wastes including lumber, drywall, insulation, and plastic being burned.

44. On June 20, 2006, DNR officials conducted a storm water compliance inspection at BBR's site after a recent rainfall, and observed a large cloud of chocolate colored water in East Okoboji Lake in front of the development. Sediment was discharging directly to the lake from a tube connected to a tile line located around the perimeter of the western most condominium. Samples of the lake showed extremely high levels of total suspended solids (850 mg/l). The contractor statement had not been signed. The open channel in the center of the site was not protected by any control measures. Virtually all of the lakeside fencing was still knocked down.

45. DNR officials returned to the site on July 13, 2006. While the open channel in the center of the project had been tiled to prevent silt from directly entering the lake, silt fencing

which had previously been knocked down was still not repaired, and other areas of silt fencing was not properly installed because posts were not set deep enough or backfilled. The certification statement was not signed.

46. DNR officials conducted a storm water compliance inspection at the site on September 14, 2006. The contractor certification statement was not signed. DNR officials again observed areas where silt fencing had been knocked down.

47. On September 22, 2006 returned to the site after a recent rainfall. DNR officials observed that water in the open channel in the center of the site was a brown color. They also noted that water in the lake at the point where the channel converged with the lake was also a dirty, brown color. Samples of the lake at this point showed a high level of total suspended solids (190 mg/l). Following the open channel upstream, DNR officials observed runoff from exposed areas running underneath silt fences which had not been properly installed and entering the open channel and then flowing to East Okoboji Lake. The contractor statement had not been signed.

Violations

Water Pollution Control Violations

48. On or about October 12, 2005, sediment from BBR's site was discharged to a water of the state, and specifically a state-owned natural lake, in violation of Iowa Code section 455B.186(1).

49. On or about June 20, 2006, sediment from BBR's site was discharged to a water of the state, and specifically a state-owned natural lake, in violation of Iowa Code section 455B.186(1).

50. On or about September 22, 2006, sediment from BBR's site was discharged to water of the state, and specifically a state-owned natural lake, in violation of Iowa Code section 455B.186(1).

51. On or about October 12, 2005, sediment discharged from BBR's site caused exceedance of applicable water quality standards in violation of 567 Iowa Admin. Code 61.3(2)"c" and "d."

52. On or about June 20, 2006, sediment discharged from BBR's site caused exceedance of applicable water quality standards in violation of 567 Iowa Admin. Code 61.3(2)"c" and "d."

53. On or about September 22, 2006, sediment from BBR's site caused exceedance of applicable water quality standards in violation of 567 Iowa Admin. Code 61.3(2)"c" and "d."

Storm Water Permit Violations

54. BBR allowed storm water discharges from the site which were not authorized by NPDES General Permit No. 2 because the discharges violated applicable water quality standards in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part I.B.2.c.

55. BBR failed to implement the provisions of its storm water pollution prevention plan in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part IV.

56. BBR failed to retain the pollution prevention plan at the construction site from the date construction activities begin to the date of final stabilization in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part IV.A.1.

57. BBR failed to amend its pollution prevention plan when its original pollution prevention plan proved ineffective in achieving the general objectives of controlling pollutants in

storm water discharge associated with industrial activity for construction activities in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part IV.C.

58. BBR failed to provide a sediment basin providing 3,600 cubic feet of storage per acre drained, or equivalent control measures until final stabilization, although more than 10 acres have been disturbed at the construction site in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part IV.D.2.A.(2)(a).

59. BBR failed to revise its pollution prevention plan after inspection of the disturbed areas at the construction site when the inspection indicated that pollution prevention measures identified in the original plan were not adequate in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part IV.D.4.B.

60. BBR continuously failed to have the contractor certification signed in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part IV.D.7.B.

61. BBR failed to retain a copy of the storm water pollution plan at the construction site from the date of project initiation to the date of final stabilization with a construction trailer, shed or other covered structure located on the site in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part V.B.

62. BBR failed to comply with all conditions of its permit in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part VI.A.

63. BBR failed to take all reasonable steps to minimize or prevent any discharge in violation of its permit which had a reasonable likelihood of adversely affecting the environment in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part VI.D.

64. BBR failed to at all times properly operate and maintain all of its systems of maintenance and control which it installed at the construction site to achieve compliance with its permit and the requirements of its pollution prevention plan in violation of 567 Iowa Admin. Code 64.3(1) and NPDES General Permit No. 2, Part VI.M.

Air Quality Violation

65. On or about June 13, 2006, BBR burned construction wastes at its site in violation of 567 Iowa Admin. Code 23.3(1).

Prayer for Relief

WHEREFORE, Plaintiff State of Iowa, ex rel., Thomas J. Miller, Attorney General of Iowa, respectfully requests that the Court:

a. assess a civil penalty against BBR pursuant to Iowa Code section 455B.191(1) for each day of violation of Iowa Code section 455B.186(1), 567 Iowa Admin. Code 64.3(1), 61.3(2)“c,” 61.3(2)“d,” and NPDES General Permit No. 2, Storm Water Discharge Associated with Industrial activity for Construction Activities, not to exceed Five Thousand Dollars (\$5,000.00) for each day of such violation, and pursuant to Iowa Code section 455B.146 for each day of violation of 567 Iowa Admin. Code 23.2(1), not to exceed Ten Thousand Dollars (\$10,000.00) for each day of such violation; and

b. issue a permanent injunction pursuant to Iowa Code sections 455B.191(4) and 455B.146 enjoining BBR from further violations of Iowa Code section 455B.186(1), 567 Iowa Admin. Code 23.2(1), 61.3(2)“c,” 61.3(2)“d,” 64.3(1), and NPDES General Permit No. 2, Storm Water Discharge Associated with Industrial Activity for Construction Activities.

Plaintiff further requests that the court tax the costs of this action to BBR, L.L.C. and provide such other relief as the Court may deem just and proper.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was sent via regular U.S. mail to each party of record addressed as follows:

Ivan T. Webber
Ahlers & Cooney P.C.
100 Court Avenue, Suite 600
Des Moines, Iowa 50309-2231

on this 11th day of June, 2007

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